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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-730

COMMONWEALTH OF PUERTO RICO AND
PUERTO RICO WATER RESOURCES AUTHORITY,
Petitioners

v.

COMMONWEALTH OIL REFINING COMPANY,
INC., ET AL.,
Respondents

PETITIONERS' REPLY MEMORANDUM

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January 8, 1980

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Respondent, Commonwealth Oil Refining Company, Inc., et al., ("Corco") in its Brief in Opposition in No. 79-730, sets forth three purported "Reasons for Denying the Writ," the first two of which are newly raised in that Brief and therefore qualify for reply pursuant to Supreme Court Rule 24.

Succinctly stated those two reasons are (1) that the "clearly erroneous" standard of appellate review makes

reversal unlikely as to the finding that Corco's principal place of business is in San Antonio, Texas and (2) that the "abuse of discretion" standard of review also makes unprobable a transfer of these proceedings to Purto Rico. Both present irrelevant procedural issues, neither bears legitimately on the decision of whether or not to grant certiorari, and Respondent's dependence upon them, rather than addressing the substance of the Petition, underscores the need to reach the substantive errors of the Court of Appeals.

REPLY POINT 1

THE CLEARLY ERRONEOUS STANDARD OF REVIEW IS APPLICABLE ONLY TO FINDINGS OF FACT, AND THE PETITION FOR CERTIORARI RAISES NO FACT ISSUES.

Petitioners urge that certiorari be granted in part because the Fifth Circuit Court of Appeals has misperceived the fundamental objectives of Chapter XI of the Bankruptcy Act and has misdefined and misapplied the rubric of "principal place of business." Further, the Court of Appeals has committed those errors in a case which is unusually important because of the breadth and variety of interests it directly affects as well as the precedential impact it will have under the new Bankruptcy Code. Petitioners have not asked this Court to second, third or fourth-guess the facts. Petitioners do strenuously seek a review of the definition of "principal place of business" and the assumptions about the objectives of the Bankruptcy Act indulged by the Fifth Circuit Court of Appeals in its treatment of the facts. The importance of granting certiorari lies not in a review of who within the Corco

organization does what, or where it is done, but rather, given essentially clear facts, what is the meaning and the purpose of the statutory context into which those facts fit. The Petition raises issues of law, issues of statutory interpretation, issues of Congressional intent, issues such as whether there should be one definition of "principal place of business" for bankruptcy venue and a second definition for diversity jurisdiction. None of these issues is reviewable by the purely fact-oriented "clearly erroneous" standard.

Respondent's effort to characterize the Petition for Certiorari as raising the "clearly erroneous" standard misses the mark entirely. The meat of the opinion of the Court of Appeals, and the part which most needs correction, is entitled "III. Venue in Chapter XI Proceedings." It is there that the Court sets forth its legal conclusions. It is there that the Court concedes the Fifth Circuit has been "inconsistent in its treatment of this issue" of "principal place of business"; it is there that the Court disregards as "irrelevant" all decisional authority as to "principal place of business" in the context of diversity jurisdiction; it is there that the Court concludes Rule 116 tacitly altered the statutory meaning of "principal place of business"; and it is there that the Court assumes the Bankruptcy Act should serve only the convenience of a debtor, to the total disregard of the interests of those with whom the debtor has chosen to do business in a place apart from the home of some of its executives. The "clearly erroneous" standard, applicable to findings of fact, has no bearing upon the Fifth Circuit Court's conclusions of law and constitutes no reason to deny the requested Writ of Certiorari.

REPLY POINT 2

THE "ABUSE OF DISCRETION" STANDARD OF REVIEW IS IRRELEVANT IN RULING ON THE PETITION FOR CERTIORARI.

This Court will not be called upon to decide whether any lower court has abused its discretion if certiorari is granted. Respondent's reliance on a contrary premise is misplaced.

Certainly, discretion has been exercised; yet, whether it has been abused is not in issue for two reasons. First, pursuant to Bankruptcy Rule 116, the parameters of permissible discretion in deciding the ultimate venue of a Chapter XI proceeding are fixed by a preliminary determination of whether venue is proper where the proceedings were begun. In this case that first, pivotal finding depends upon where the debtor has its principal place of business. It is that initial fundamental decision which creates the most compelling reasons for this Court's review, not the subsequent election to retain the proceedings where venue has been incorrectly deemed to be proper. Second, Rule 116 permits different degrees of discretion to change venue, depending upon whether the initial venue, in light of the debtor's principal place of business is proper. If the initial venue is found to be proper where it is, Rule 116 presumes that is where it should stay. The Court, accordingly, has only limited discretion to transfer it elsewhere.

Conversely, if the debtor's principal place of business is other than where the proceedings were begun, venue is improper and presumptively should be changed, subject only to a narrowly circumscribed discretion *to retain. In Re Bankers' Trust,* 403 F.2d 16, 23 (7th Cir. 1968)

("[D]iscretion to *retain* jurisdiction 'should be exercised with great caution and in few cases'. . . ." [emphasis supplied]).

There is no question here of whether discretion has been abused. To the extent discretion is involved here at all, it is subjugated to far more pressing issues which Petitioners have asked this Court to review. If discretion is to be addressed, the question is not whether it was abused, but only whether its scope has been properly perceived and followed.

CONCLUSION

Neither of the procedural appellate review arguments Respondent has made is pertinent in weighing the reasons why certiorari should be granted. The compelling need for High Court correction of the precedent set by the Court of Appeals remains essentially unanswered and substantially unchallenged. This is an important case, involving important, enduring issues, fully deserving of this Court's attention and decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on each of the following parties by placing same, postage prepaid, certified mail, return receipt requested, in the United States Mail, on this the 8th day of January, 1980:

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